IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1951

No. 288

Office-Supreme Court, U. S.
FILED
AUG 28 1951
CHARLES ELMORE CROPLEY
CLERK

[redacted]

v.

[redacted]

[redacted]

TO THE HONORABLE FRED M. VINSON, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

[redacted]

2. The case without cause was filed in the United States District Court for the Northern District of Illinois Eastern Division, by the petitioner as a common citizen seeking aid and protection at law by reason of the act of Congress, in such case made and provided; thereafter the cause was dismissed by the District Court without prejudice to petitioner,

3. Petitioner complied with [redacted] the Court of Appeals for the Seventh Circuit, and said cause was heard upon the petition for leave to appeal in forma pauperis and the transcript of record from the District Court, the petition and proofs filed in the appropriate manner as set out in the printed record prepared by the clerk of the Court of Appeals.

4. The Court of Appeals entered its judgment of the [redacted] petitioner herein, denied a petition for rehearing [redacted], and a petition of the respondent for certiorari to the United States

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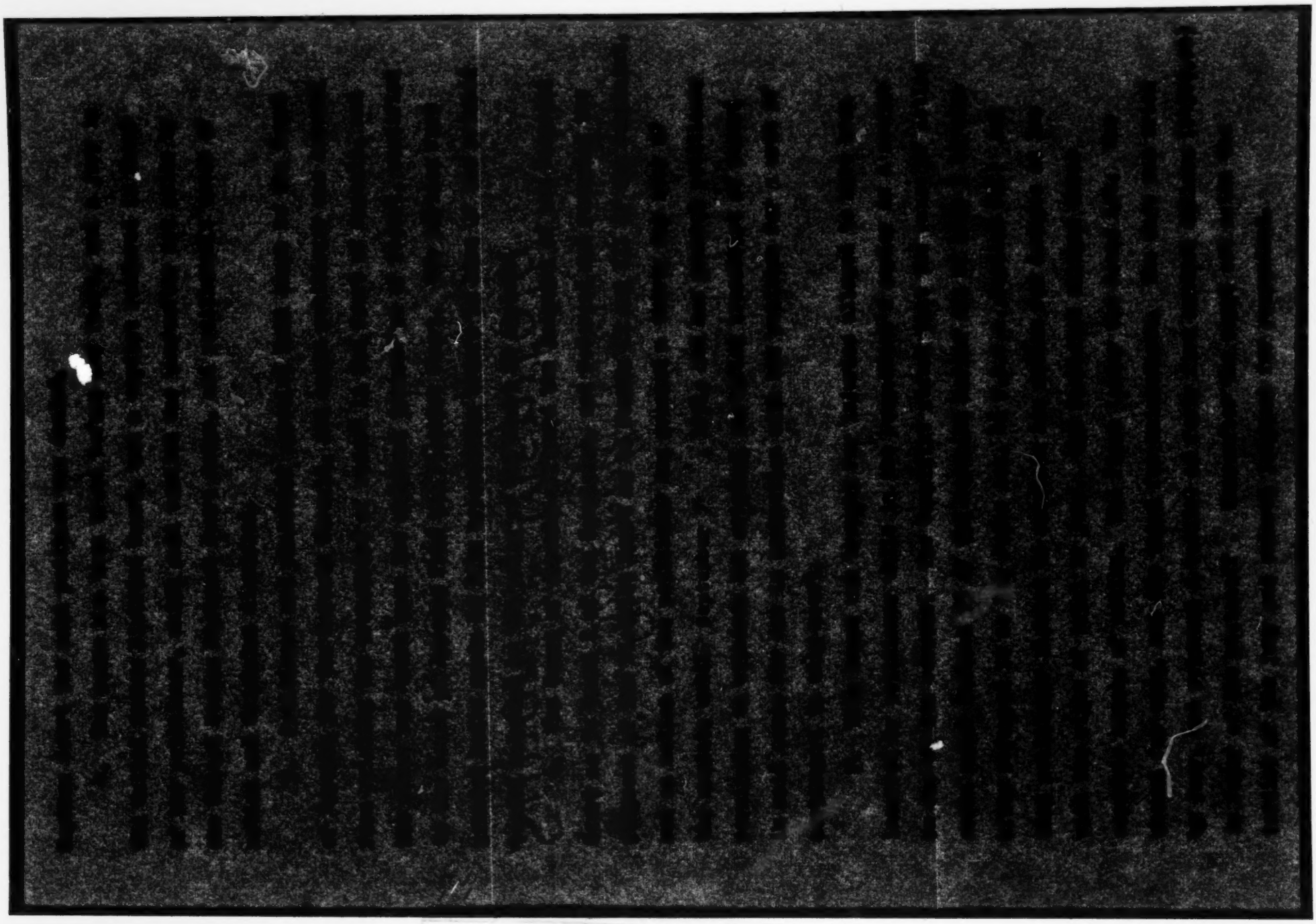

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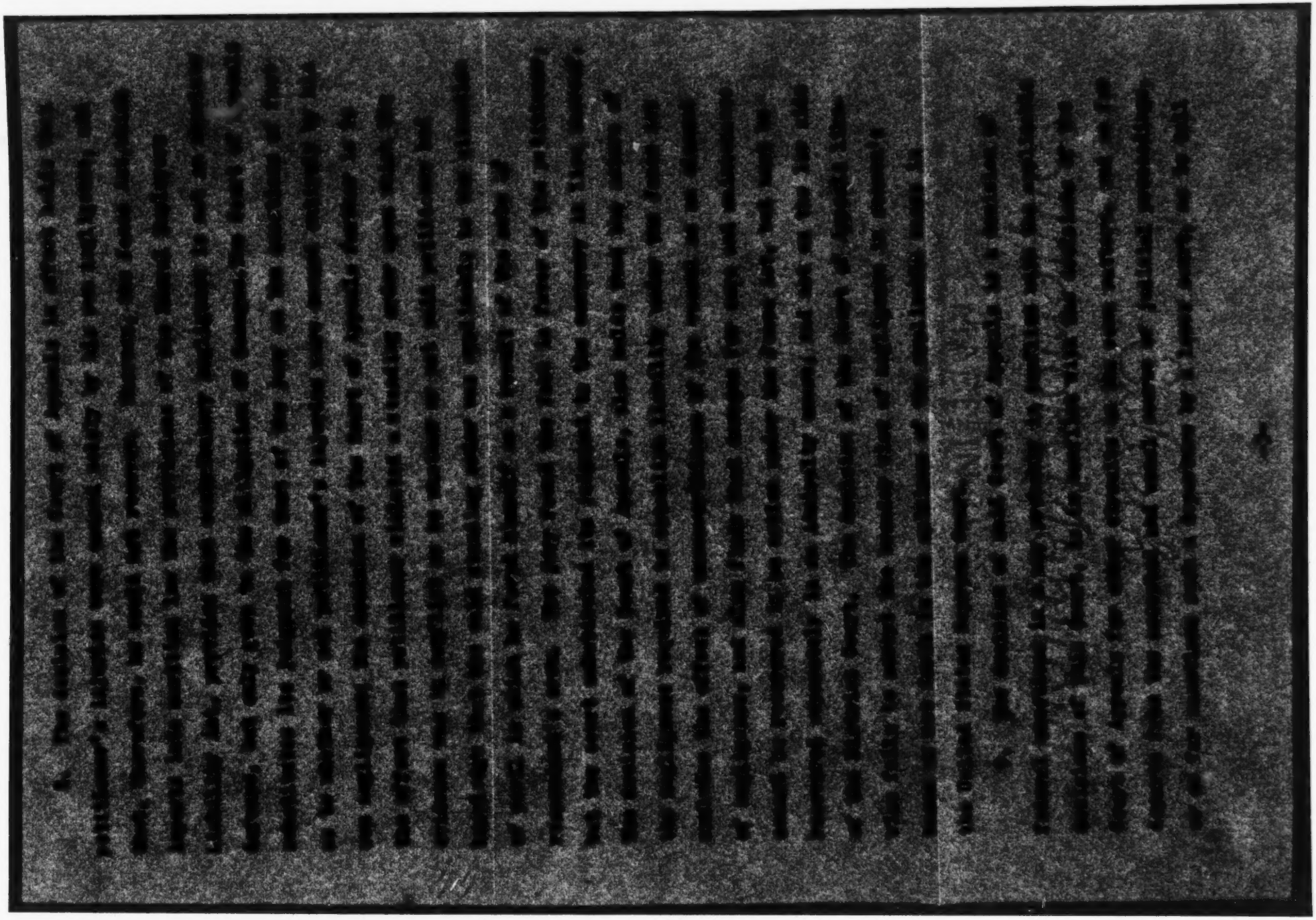

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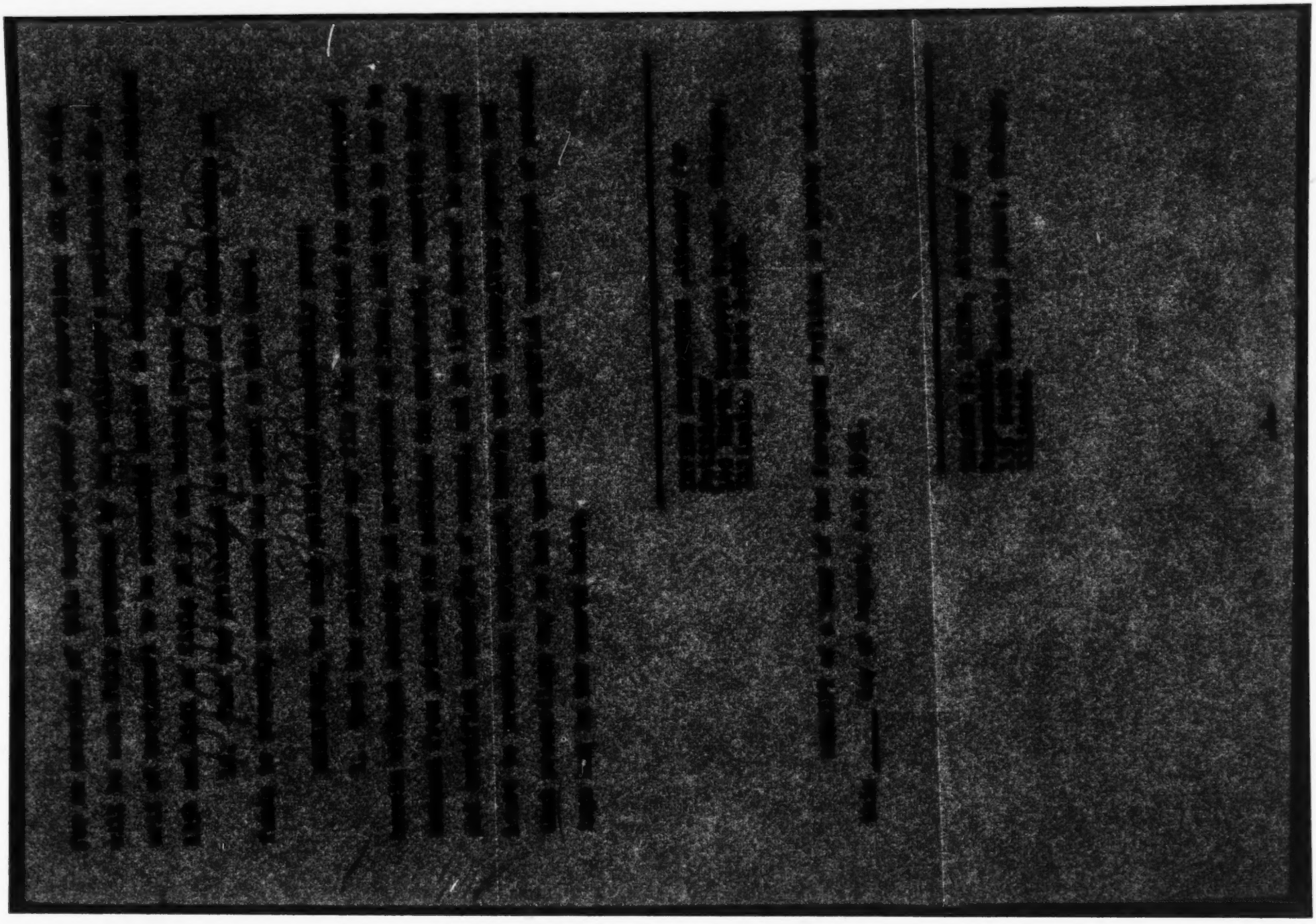

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CHARLES ELMORE CROPLEY

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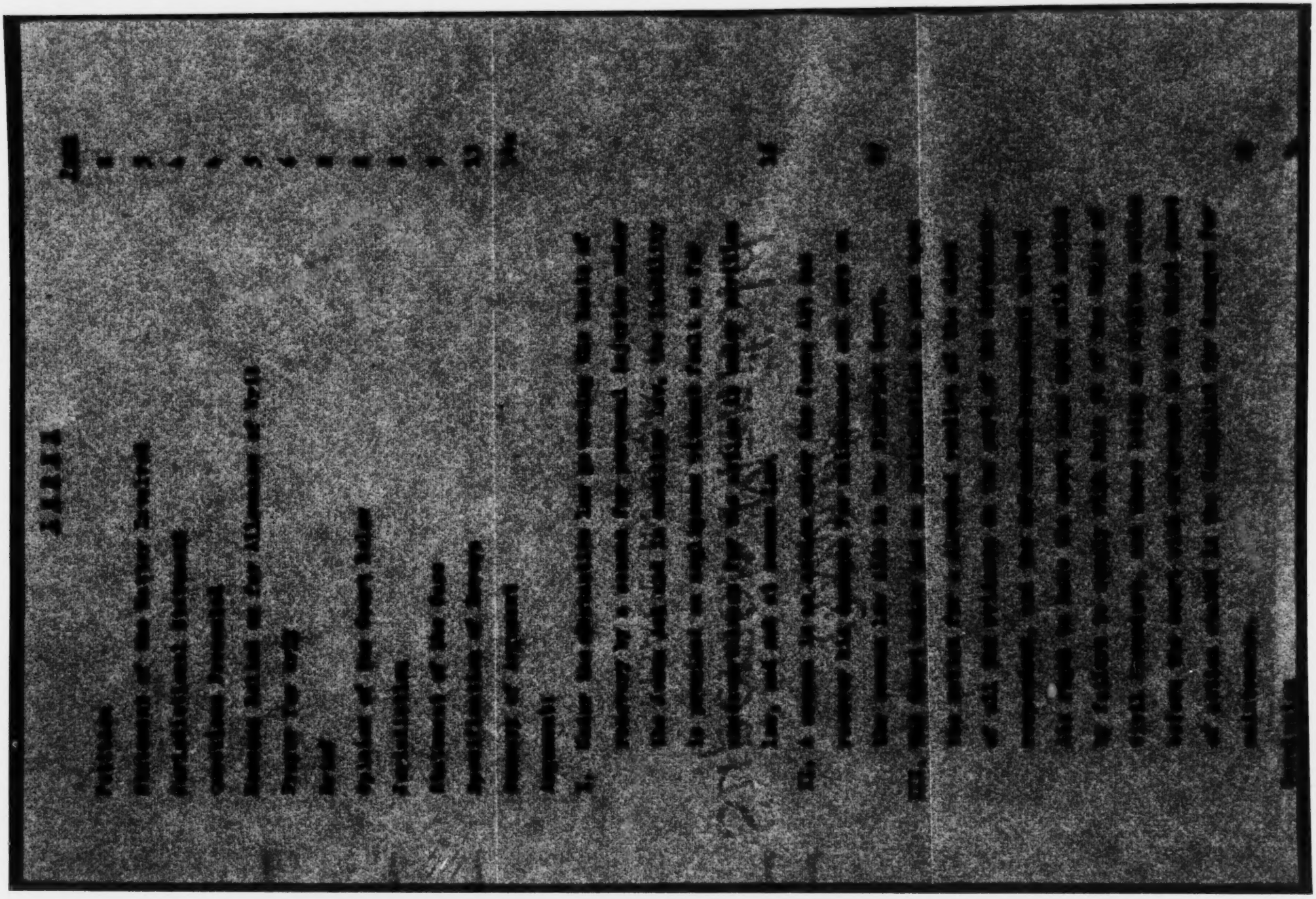

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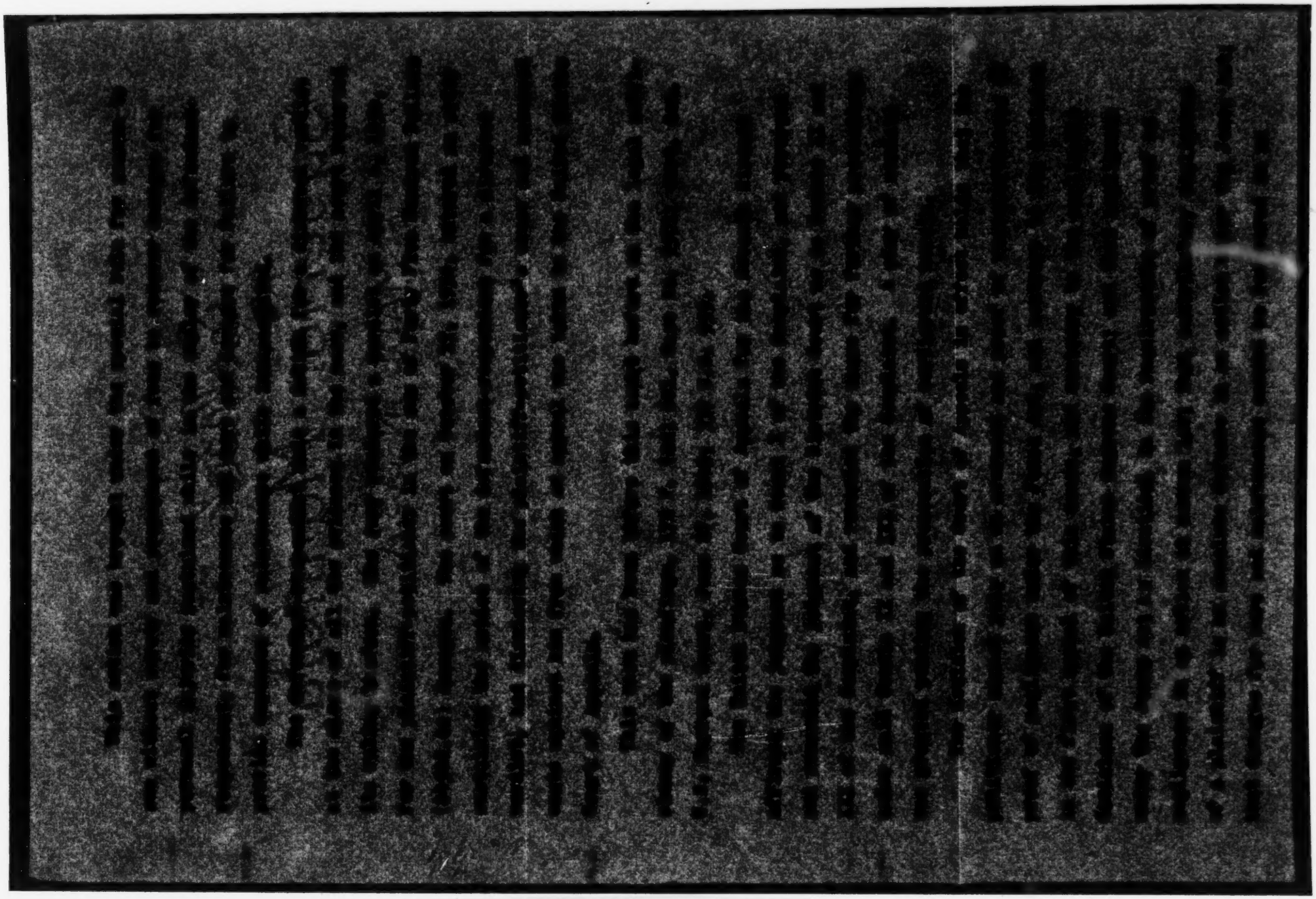

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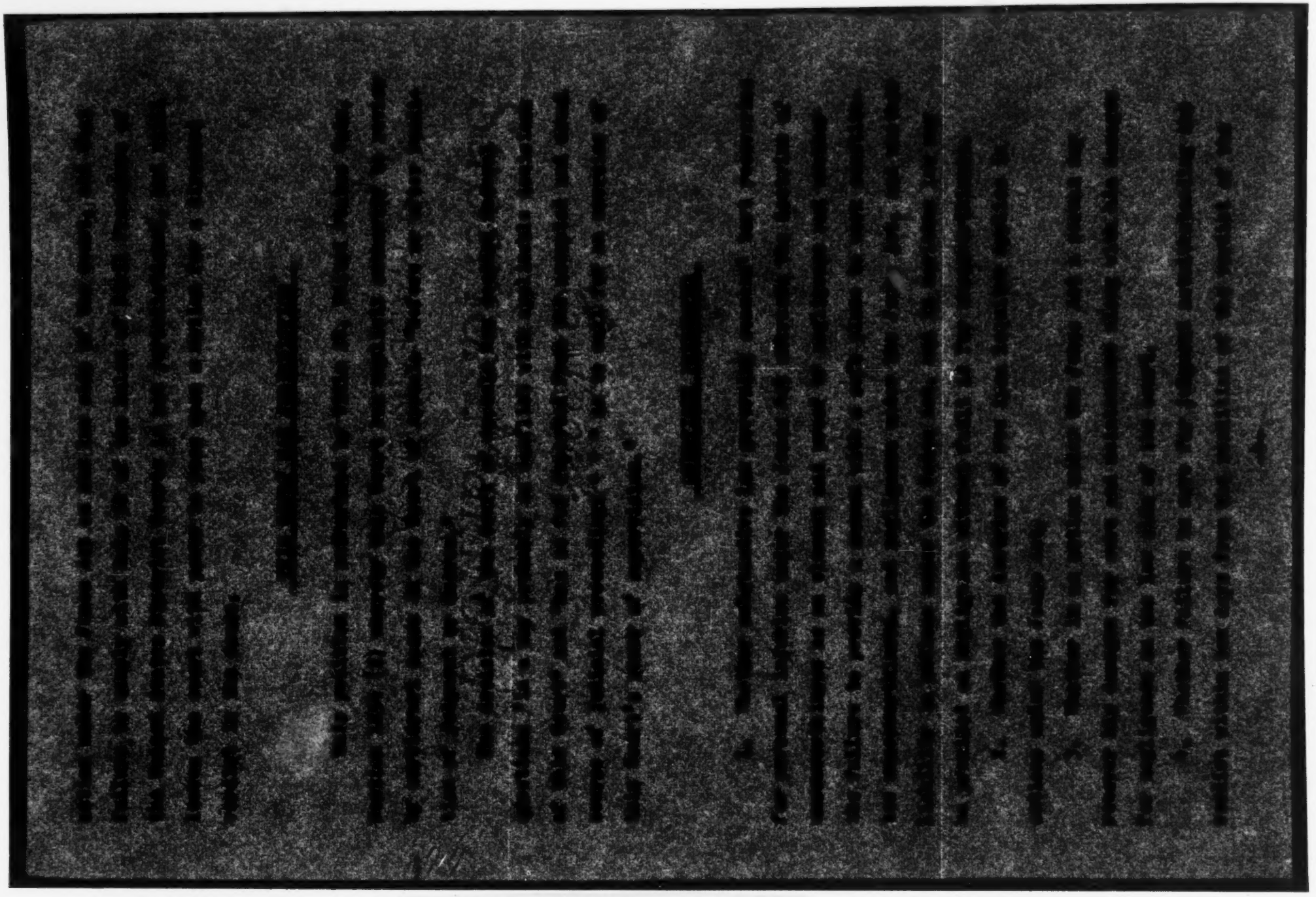

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jury as provided for in sub (b) (5) of Rule 38 of Civil Procedure for the United States District Courts is jurisdictional.

[redacted]

1. The decision of the Court of Appeals in effect holds that the District and petitioner could not even get his case to the jury because the Jones Act by grant of compensation, and the failure to provide him with a safe place in which to work, and not by electing to proceed under the Jones Act, petitioner "abandoned his theory of unseaworthiness". Liability in action under the Jones Act, and in particular for it provided on negligence without fault on the unseaworthiness. Sun Shipping Co. v. Pennsylvania, 328 U.S. 85. An action under the Jones Act is an action in admiralty, and under maritime law, and is not one at common law. Panama R. Co. v. Johnson, 264 U.S. 375; Charles Nelson Co. v. Curtis, 3 F (2d) 736. The general rules of the maritime law apply whether the proceeding be instituted in the admiralty or common law court. Garrison Fishing Co. v. Anderson, 270 U.S. 230, 235. The law of the sea is controlling without regard to the court wherein the damage suit is filed. Chelentis v. Luckenbach S.S. Co. 247, U.S. 372. Negligence under the Jones Act is based on unseaworthiness and liability without fault rests on the employer. Aguirre v. Shipping, 249 U.S. 273; Seaboldge v. Moran Co. & Kinney T. Co. 207 U.S. 278; Sieracki v. U.S. Shipping Corp., 317 F (2d) 99; Carter v. Baltimore Insular Line, 287 U.S. 367; Jackson v. Commissioner, 301 U.S. 605; Aitch U.S. Corp. v. Dorn, 301 U.S. 692; Williamson v. Moreland, 276 U.S. 31; Lavender v. Kurn, 327 U.S. 645; Murphy v. Overlake Freight Lines, 177 F (2d) 368 (2 C.A.) (Oct. 1949); Francis v. Sun Shipping Co., 178 F (2d) 539; The decision of the Court of Appeals is in direct conflict with these decisions, and constitute the decision of a federal question in a way probably in conflict with the applicable decisions of this court above cited.

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2. The decision of the Court of Appeals in holding that claims for maintenance and cure cannot be had on the law side of the Court as part of the damages under the action for negligence under the Jones Act, is contrary to the applicable decisions of this Court and certain District Courts. Aguilar v. Standard Oil Co., 318 U.S. 724; Cruse v. Diamond Lobster Co., 2 F. Supp. 332; The Progreso, 11 F Supp. 372; Harlan v. The Atlantic Sup. Corp., 101 F (2d) 997; Ohio of Minnesota, 17 F 390.

3. The decision of the Court of Appeals ignores the provisions of Rules of Civil Procedure for United States District Courts 59 to the effect that failure to move for judgment notwithstanding the verdict within ten days is jurisdictional. Cone v. W. Va. Pulp & Paper Co., 330 U.S. 212; Northwestern Overland Lines v. McGoffery, 9 F.R.D. 434 (D.C. 1949,) 169 F (2d) ); Wortley Service, 332 U.S. 364; Cooper v. Washington Gas (U.S. App.1939,) 37 F Supp. 4; Cooper v. Powell (U.S. Miss. 1939,) 37 F Supp. 213 aff'd, 108 F. (2d) 313; Lumber Dealers v. Northwestern Fuel Company, 28 F.R. Supp. 971, 972. The above decisions indicate the concept of the function and role of the court of appeals in the judicial, and of the powers from the concept and exact scope of judicial proceedings, as it its exercise such a function as to call for an exercise of this court's power of supervision, particularly with regard to rule 59 promulgated by this Court.

4. The decision of the Court of Appeals fails to recognize that the doctrine of pro tanto applies in actions under the Jones Act. Pelham v. U.S., 70 F. Supp. 257, 22 L. Ed. 2d. 753.

[illegible] that the cause in the court below should be remanded to the District Court for further proceedings consistent with the opinion of this Court.

Respectfully submitted,

[illegible]

Attorneys for Petitioner

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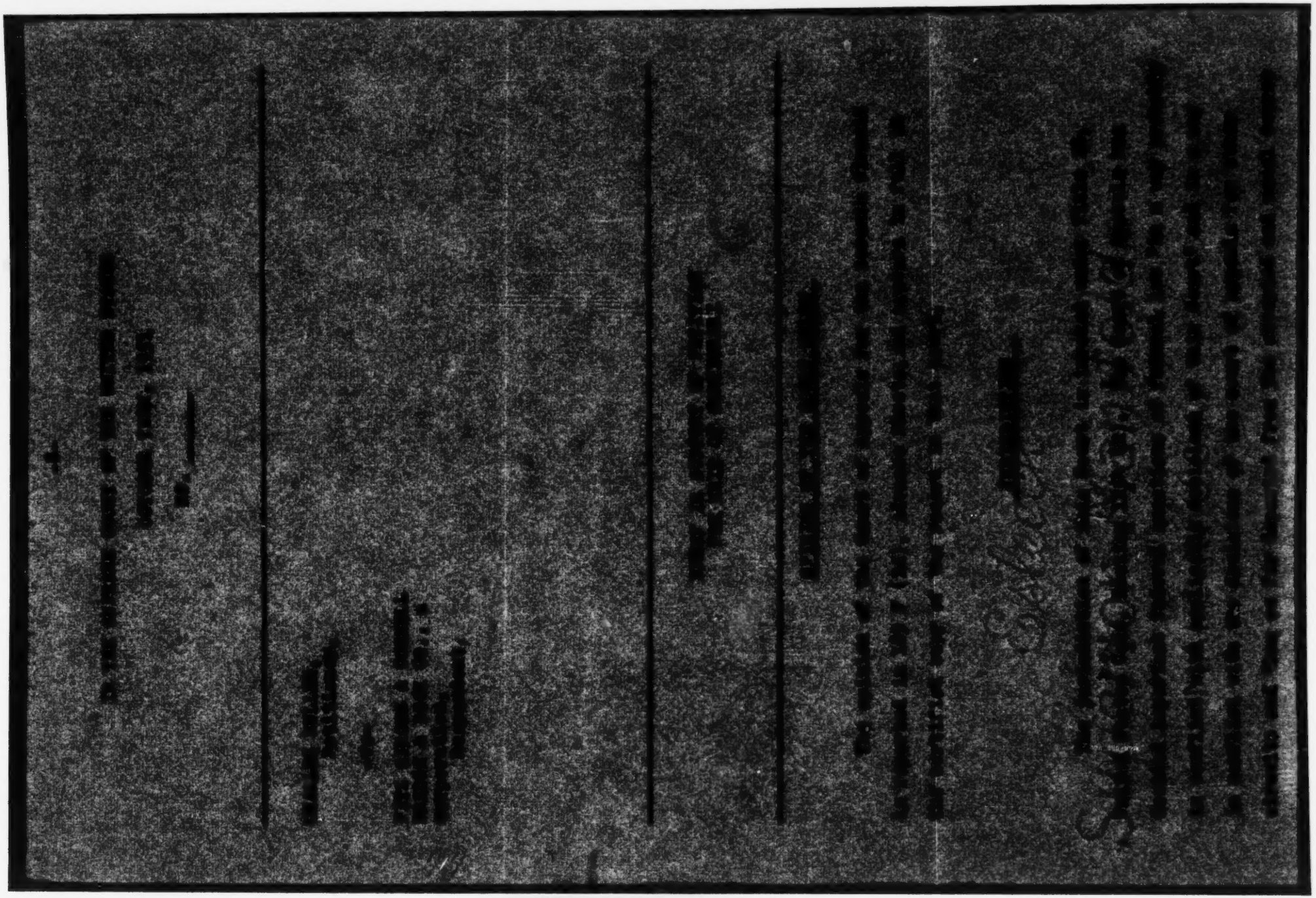

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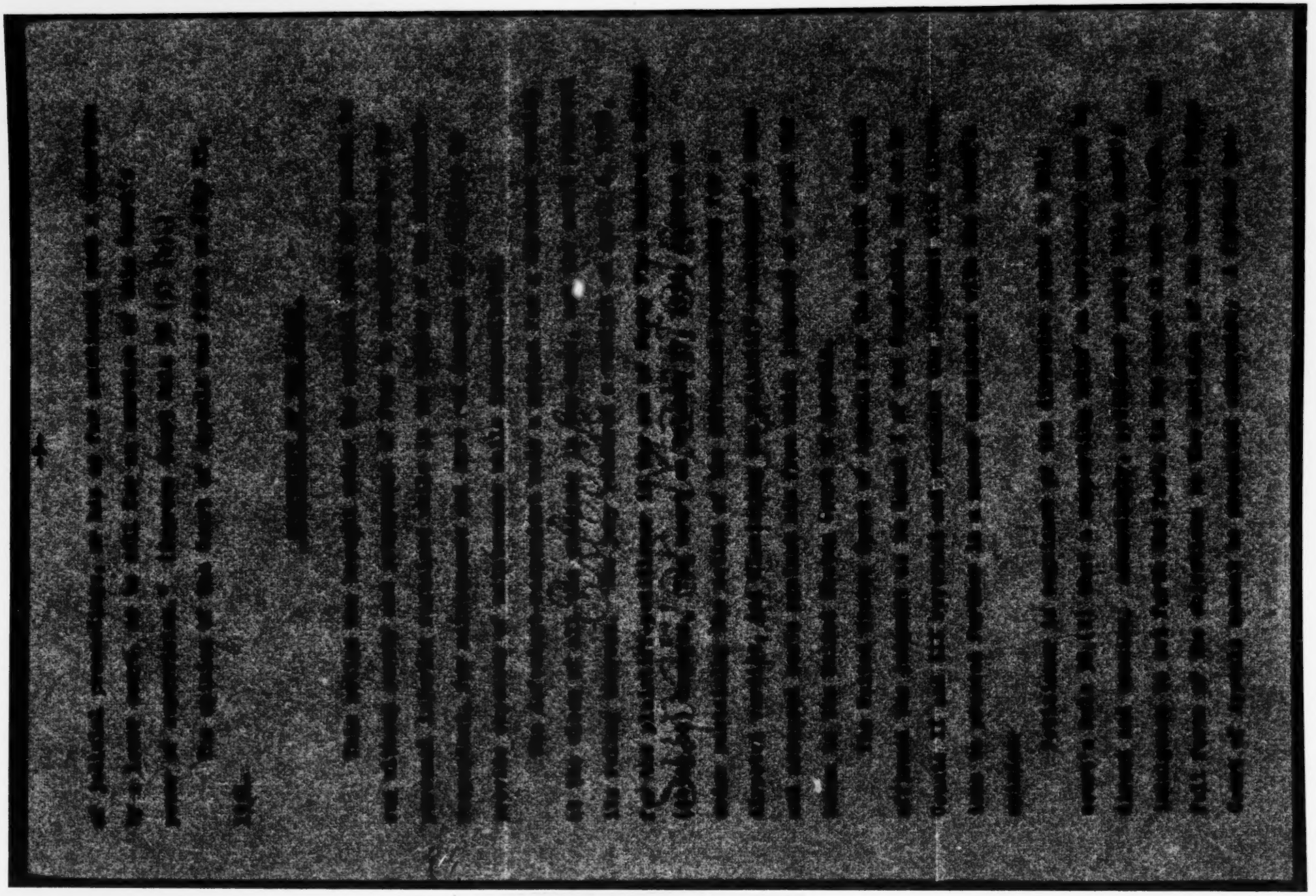

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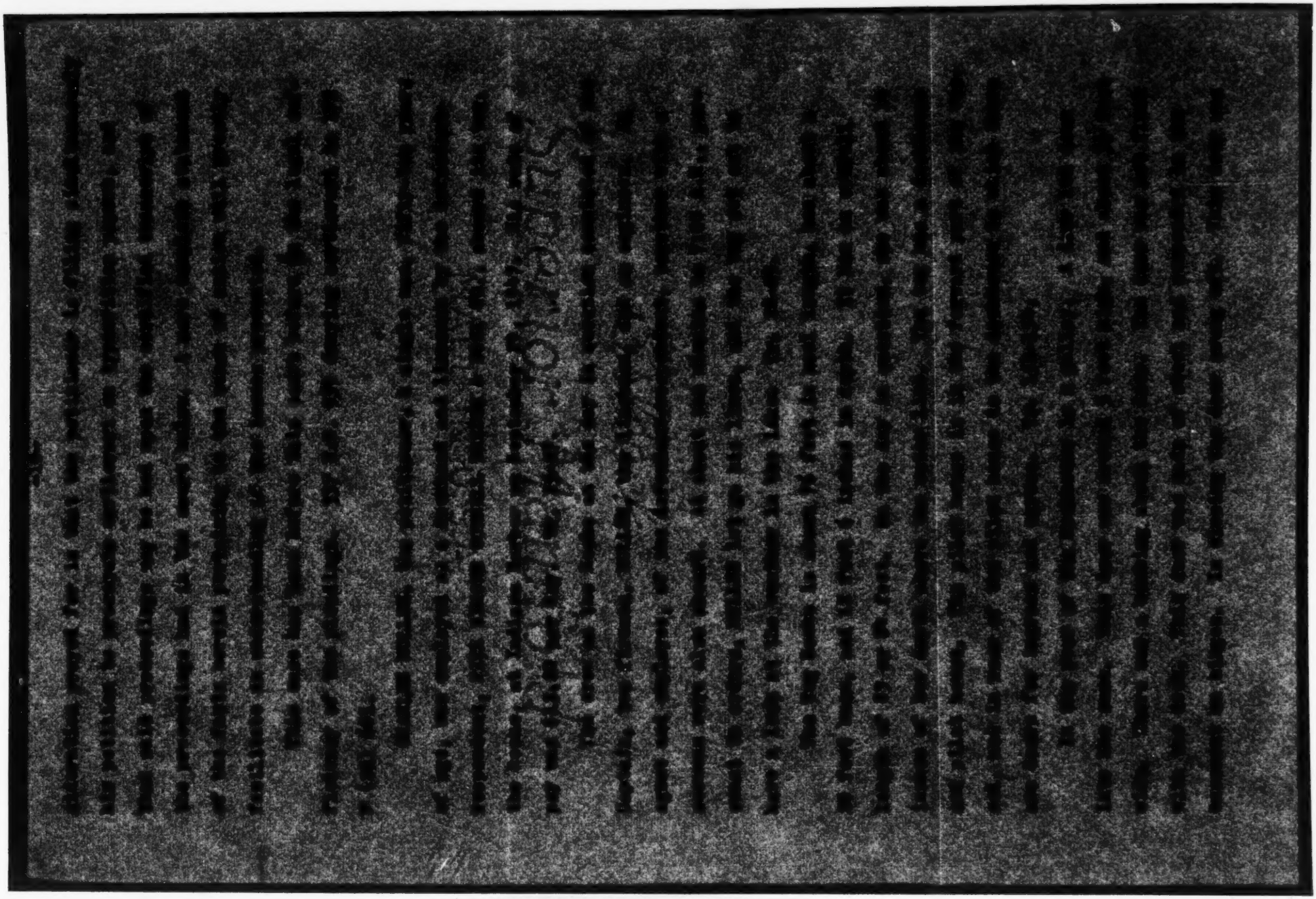

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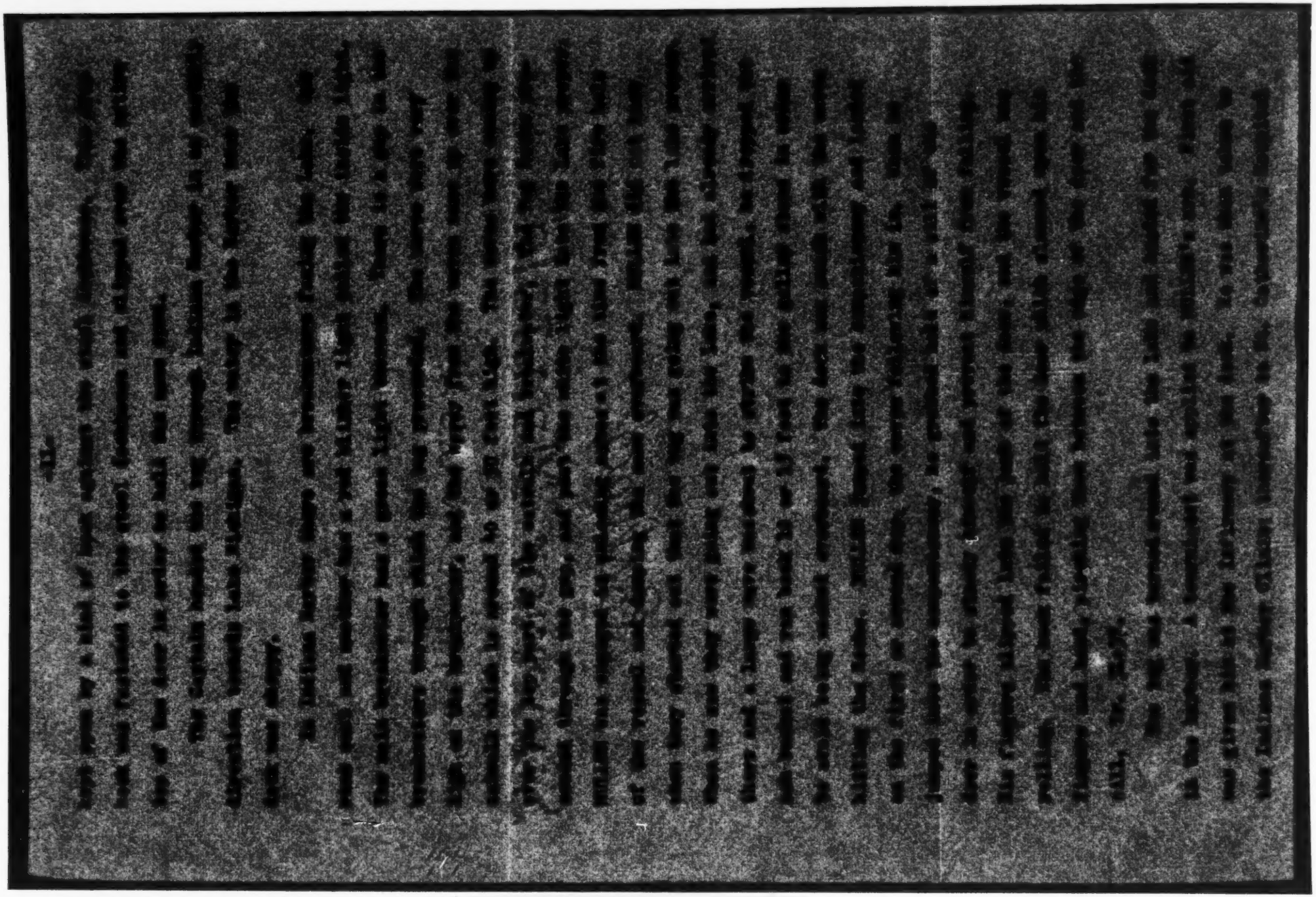

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[illegible] there he remained for a period of [illegible] days right on [illegible] [illegible] [illegible]

though the Captain testified to the contrary, and this was a question of fact resolved by the jury in his verdict. Tr. 141 and 142.

At the close of petitioner's case, defendant-respondent filed a motion to dismiss the cause which dealt only with Count I of the Complaint. After the court indicated that it would reserve the ruling on this motion, defendant decided to proceed and put in its proof. Tr. 12; 106-107-108.

At the close of all the evidence in the case, on April 5, 1950, defendant-respondent renewed a motion for a directed verdict as to Count I and Count II of the Complaint. Tr. 155-156. No motion is made in the written motion of Count III of the Complaint relating to petitioner's claim for maintenance.

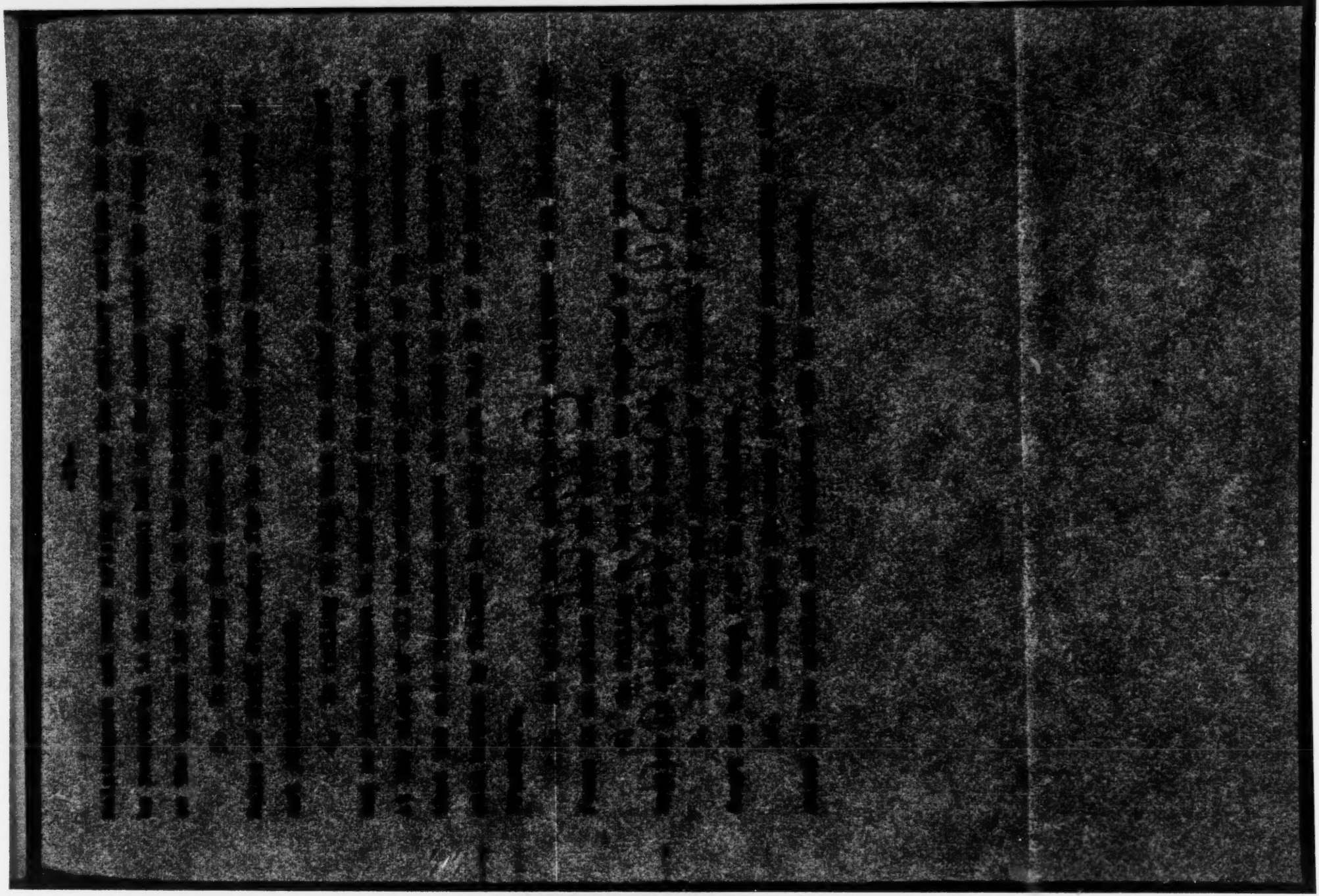
Defendant-respondent stated by his counsel, "that the motion of the defendant for dismissal at the close of plaintiff's case would be identical with the motion of the defendant for dismissal at the close of all the evidence". Tr. 12.

[redacted]

(The Court of Appeals erred)

1. In holding that in an action brought on the express [illegible] the Maritime Court, under the /war/ act, the general maintenance and cure of seamen/sailors, and that consequently it was not [illegible] of negligence and proof thereof in such a suit.

2. In holding that the petitioner produced no evidence on [illegible] the proximate cause of the injury, contributory cause [illegible] was not /sufficient/ with a reasonable [illegible] [illegible] [illegible]



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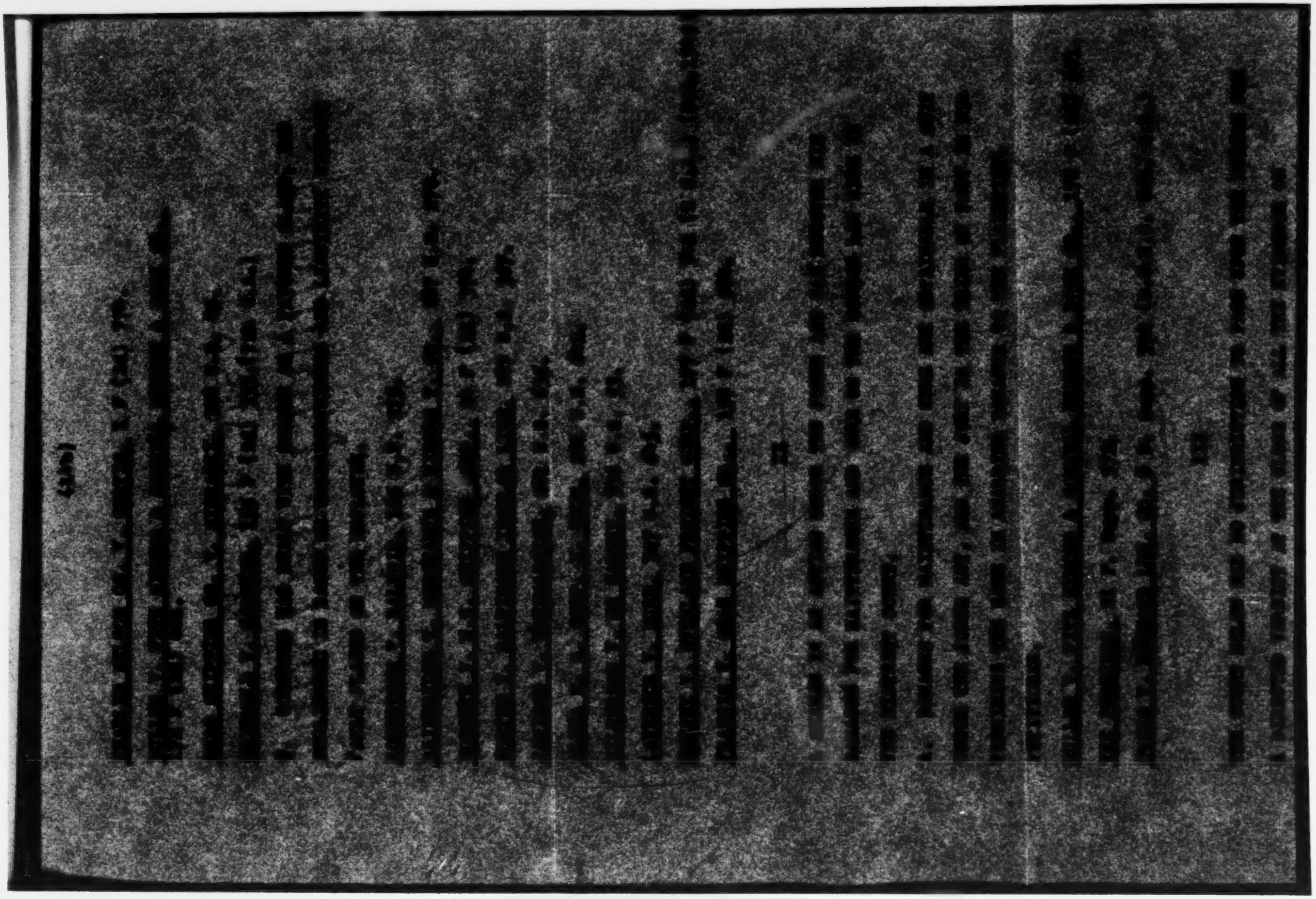

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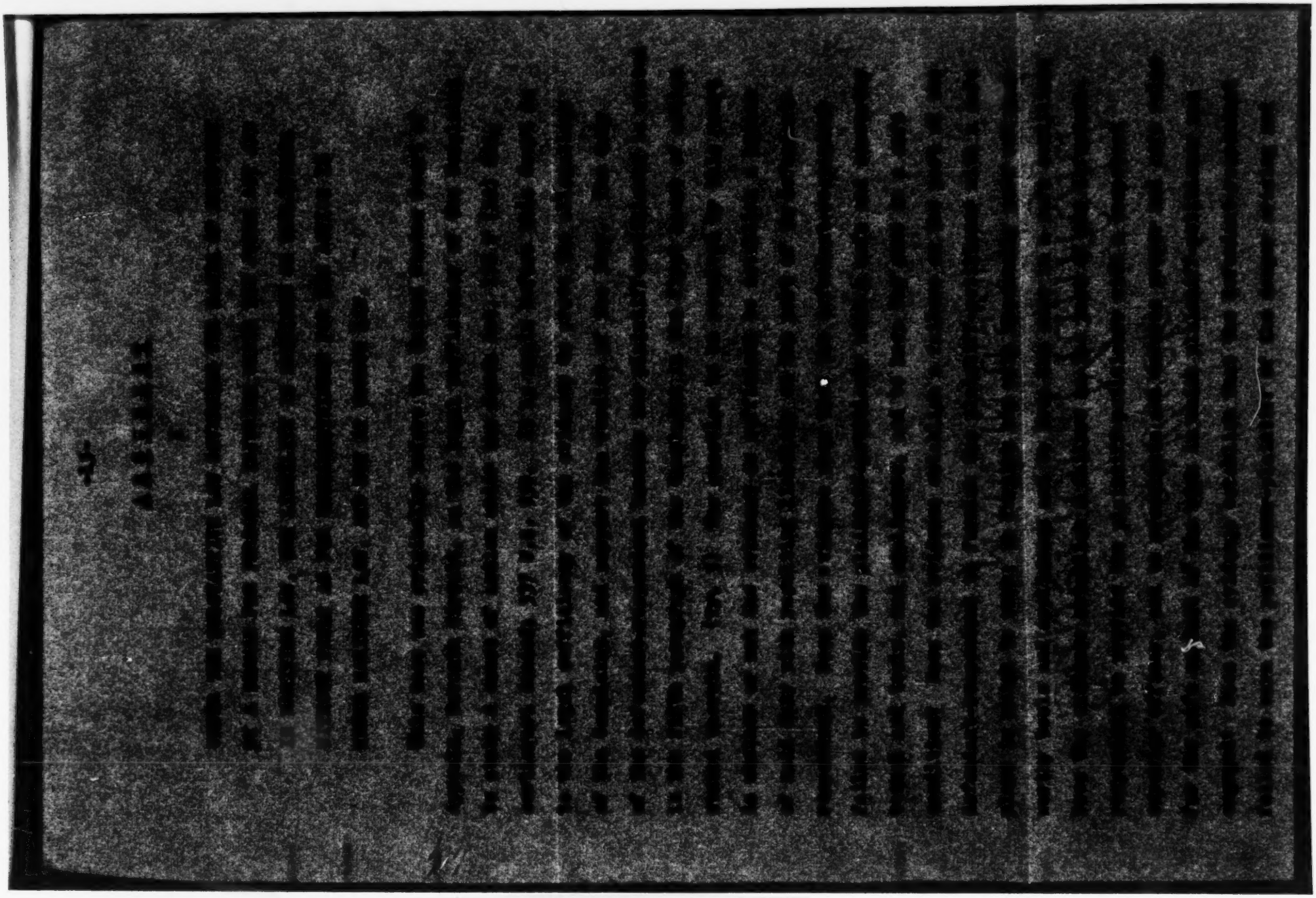

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to be unnecessary therein.) A consideration of the evidence will reveal no basis whatever for an affirmative answer to the question of whether the defendant-respondent failed to properly inspect the track, and whether the same is the cause of the accident complained of, and consequently was guilty of failure to exercise ordinary care, constituting negligence under the Jones Act, and is a question for the jury. [illegible] the court was correct in submitting said question to the jury, and the jury's finding thereon was conclusive upon the court

facts and circumstances would or would not be done by an ordinarily reasonable man under the same facts and circumstances with resulting injury and damage. The court failed to take into consideration the conception of negligence in actions under the Jones Act, and in maritime law, wherein the liability is premised on negligence without fault as for unseaworthiness, and is set forth in the case of Sans Shipping Co., Inc. v. Sieracki, 328 U.S. 85.

The Court of Appeals seemed to be much impressed, also with the fact that no proof was offered as to any inherent defects in the hook holding the door open, and deemed the fact that the hook failed in its mission to hold the door open resulting in injury to the plaintiff-petitioner, was not sufficient to establish unseaworthiness and negligence along with the other matters, facts and circumstances in this case.

The doctrine of Res Ipsa Loquitur applies in actions under the Jones Act. In Johnson v. U.S., 92 L. Ed. 323; 68 Sup. Ct. 347, the United States Supreme Court was called upon to decide whether the doctrine of Res Ipsa Loquitur applied to an injury to a seaman caused by a libel in personam under the Jones Act, caused by the apparent negligence of a fellow seaman in dropping a block. Testimony of the supposed negligent seaman was not offered, although it appeared that he [illegible] the block. The District Court found negligence.

The United States Supreme Court held in an opinion by Mr. Justice Douglas, that on the basis of petitioner's uncontradicted testimony, a case for the application of the doctrine was made out. The United States Supreme Court reversed the Court of Appeals for the Ninth Circuit, and affirmed the judgment of the United States District Court.

It is clear, therefore, that no proof of negligence is required beyond the accident itself, which as here necessarily involves negligence on the part of the defendant-respondent, which had control of the operation of the ship, free and hook. There as here, the hook and door and ship is shown to be under the management of the

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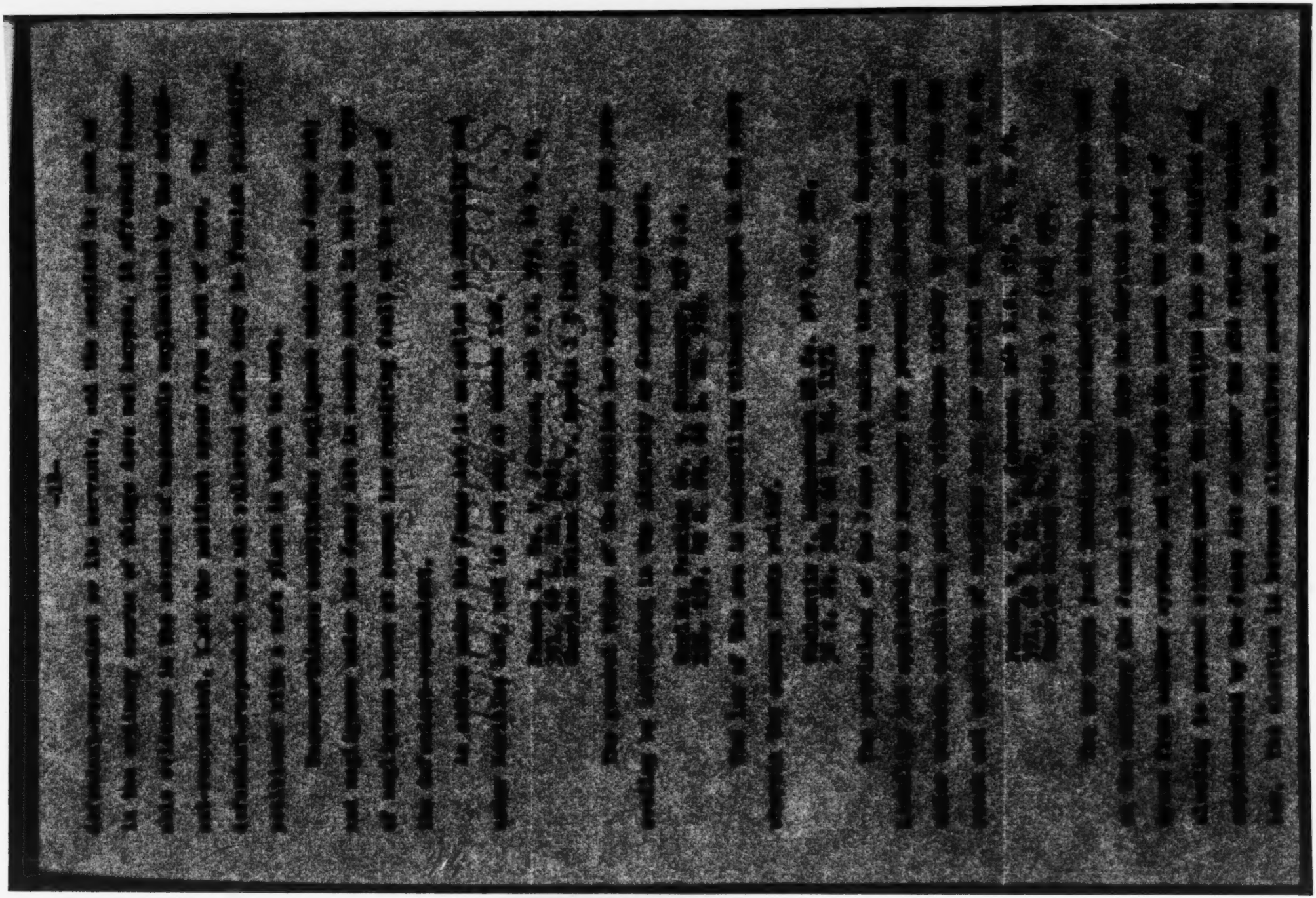

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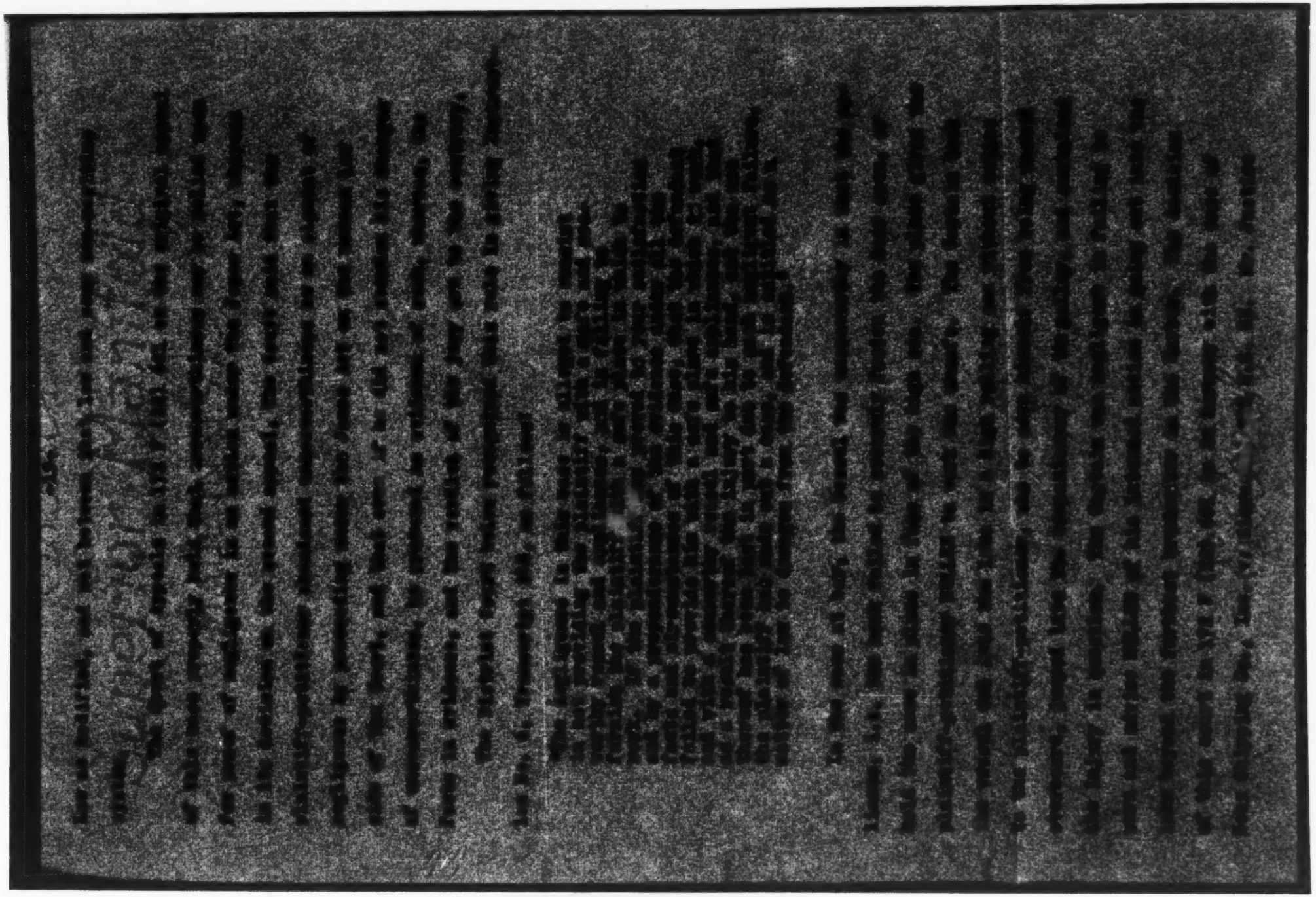

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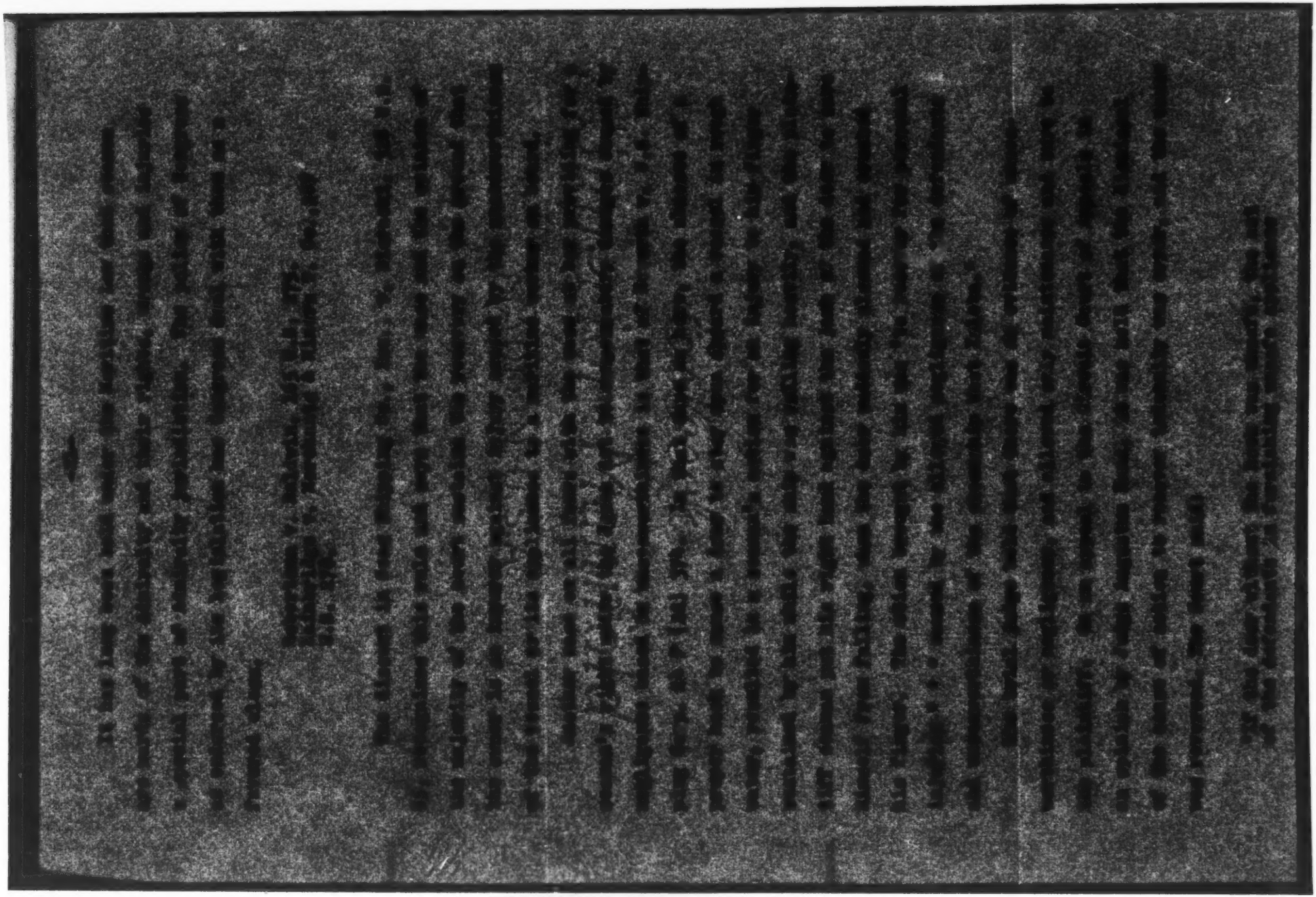

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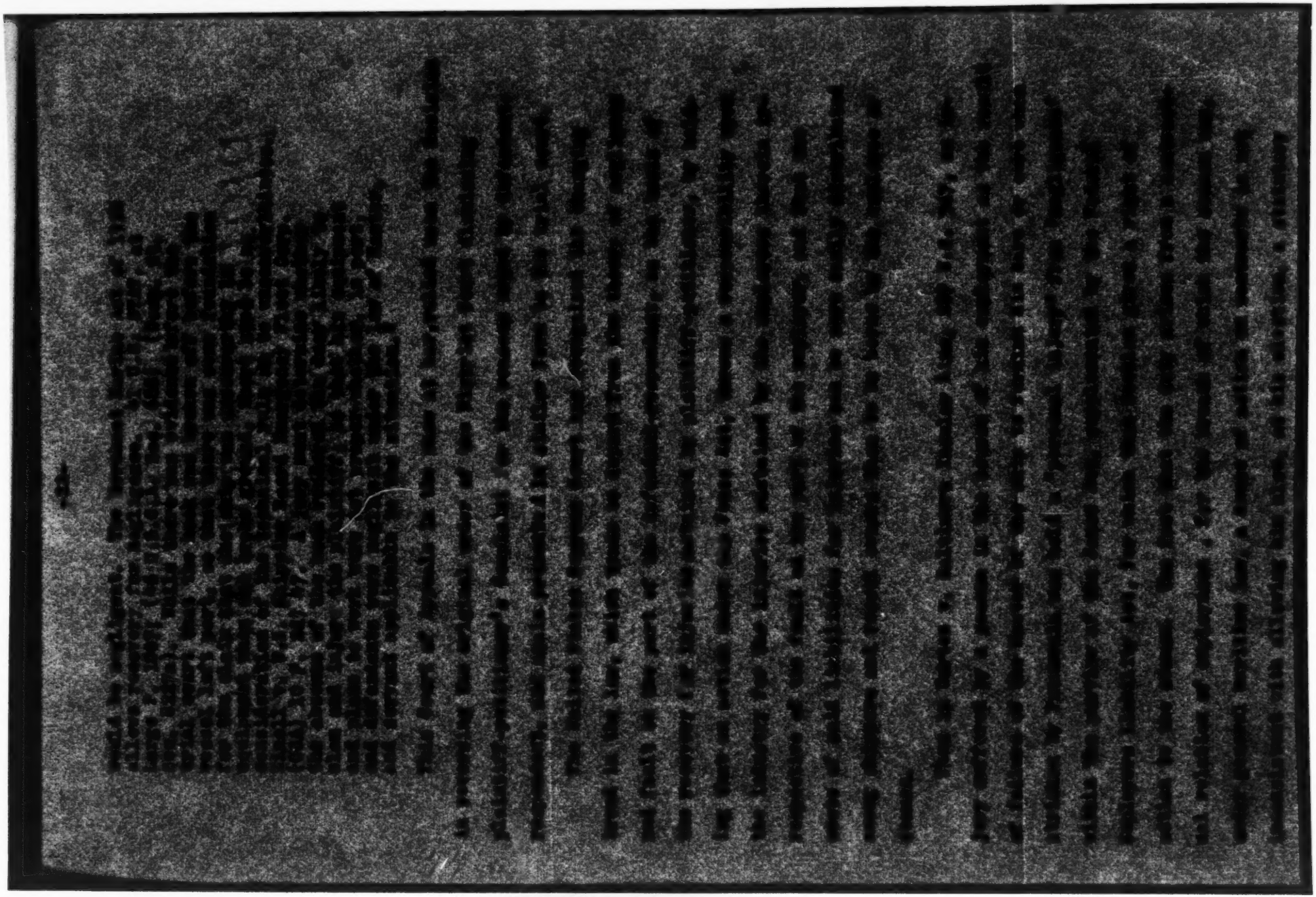

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[illegible] failure [illegible] of the duty results in [illegible] of duty or risk.

In this case Judge Hastie wrote the opinion. The seaman died of [illegible] contracted while ship on a voyage from Florida to New York. He died in a hospital in New York. The administratrix sued for damages for failure of the master to provide proper care. Judge Hastie refers to the fact that an assault by one seaman on another with a view of carrying on the war of the crew to negligence and issues in a suit against the owner because an admiralty court.

[illegible] v. Zimmerman, 68 U.S. 491.
Alpha S.S. Corp. v. Cote, 201 F.2d [illegible].

Failure to furnish care is a personal injury actionable at the suit of the seaman.

At page 777, Judge Hastie says:

"We do not read the act for the relief of seamen as requiring the will of Congress that only the most direct and immediate liability be asserted by suit shall impose liability upon employers by water. The abolition of the fellow servant rule there as here, and the diversity of application between diversity of duties, this court has said that 'the ancient characterization of seamen as wards is obviously to even more accurate now than it was formerly'."

Robertson v. Baldwin, 165 U.S. 275, 287.

"The suit for the prevention of maltreat[illegible] here not Action negligence. Congress did not mean that the standards of legal duty were to be set anew by each and [illegible] Congress meant to [illegible] this duty must be [illegible] [illegible] by duty that is shall have been [illegible] for the benefit of the seaman and for the protection of his health and safety, and that the highest solicitude to fulfill it shall have resulted in damage to his person. When the occurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed on carriers by rail".

In the above case the plaintiff recovered damages in the District Court which judgment was reversed by the Court of Appeals, and in turn the Court of Appeals reversed by the United States Supreme Court, and the District Court judgment affirmed.

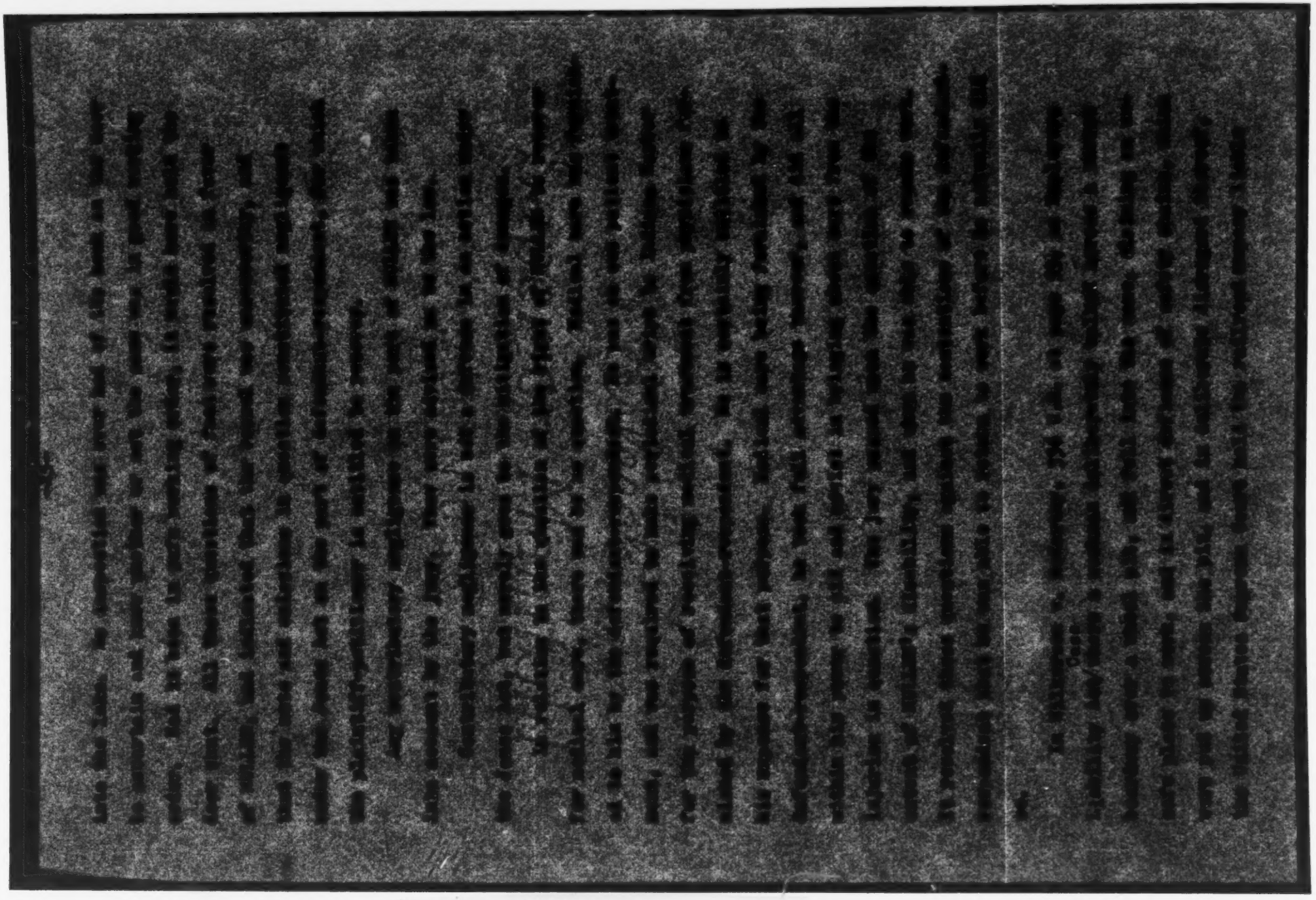
This case is clear that negligence under the Jones Act is not the type of common law negligence that was even formerly thought to prevail under the Federal Employers Liability Act's.

As hereinbefore demonstrated, negligence under the Jones

Act is now far from that is required to prove negligence at common law.

In the case at bar, the tug "ROOKE" was unseaworthy at the time and the place of the injury to the plaintiff-petitioner. The jury by its verdict found that the defendant-respondent failed to provide the plaintiff-petitioner with a safe and seaworthy vessel and appliances. It found that the defendant-respondent failed to furnish plaintiff-petitioner with a safe place in which to work, and that it failed to furnish him with reasonably safe and seaworthy appliances, and to keep the same in a safe condition.

The boat in question failed to hold the door shut, and it closed upon plaintiff petitioner's hand. If the boat had held the door, the injury would not have occurred. Which was hurt by reason of the lack of safety of the place in which he was given to work. It was a question of fact whether or not the captain of the vessel actually knew that they were going out into the bay and beyond the breakwater. [illegible] testified he had no such orders. The [illegible] testified he gave such orders to [illegible], which was corroborated by one of the firemen who said he heard them given. (Tr.135) The jury resolved this question in favor of [illegible]. It was an act of incompetency on the part of [illegible], superior officer in failing to give the proper orders and to promulgate and enforce proper and safe rules for the safe conduct of [illegible]'s work. [illegible] was given no warning of the danger arising, and he had no knowledge. [illegible] did not know that the captain intended to go out into the bay, so he could not have exercised any reading proper to protect [illegible], and make the vessel safe as stated in the [illegible] of the United States Court of Appeals, 4th Circuit says, "His failure to perform his duties only as a foreman was the sole cause of the injury". [illegible] had the right to rely on the jury finding, upon the fact that the captain of the tug pulled out into the ocean with the intention of going beyond the breakwater at a height of fifty feet while there was still in the harbor, and there was no occasion to go out



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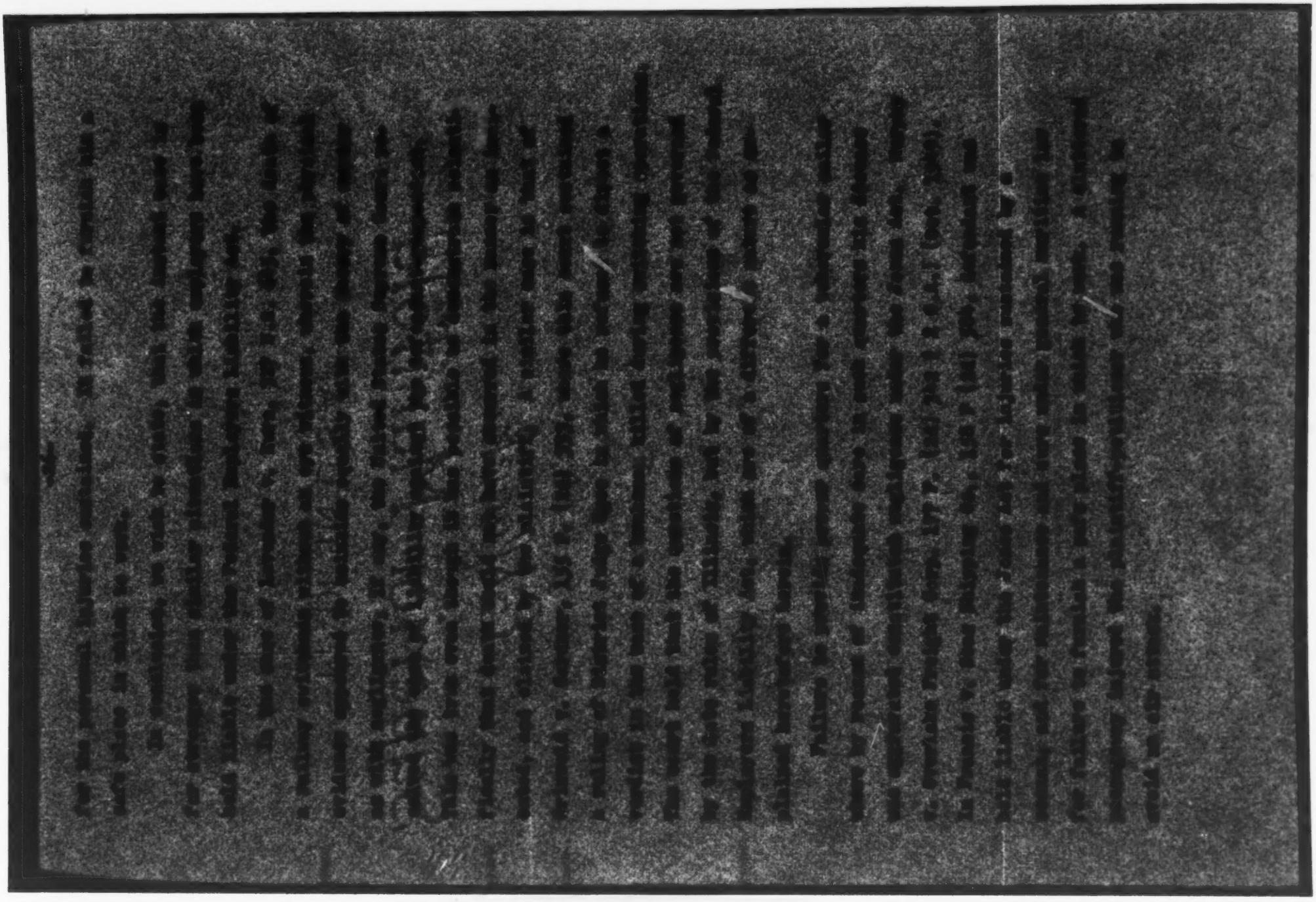

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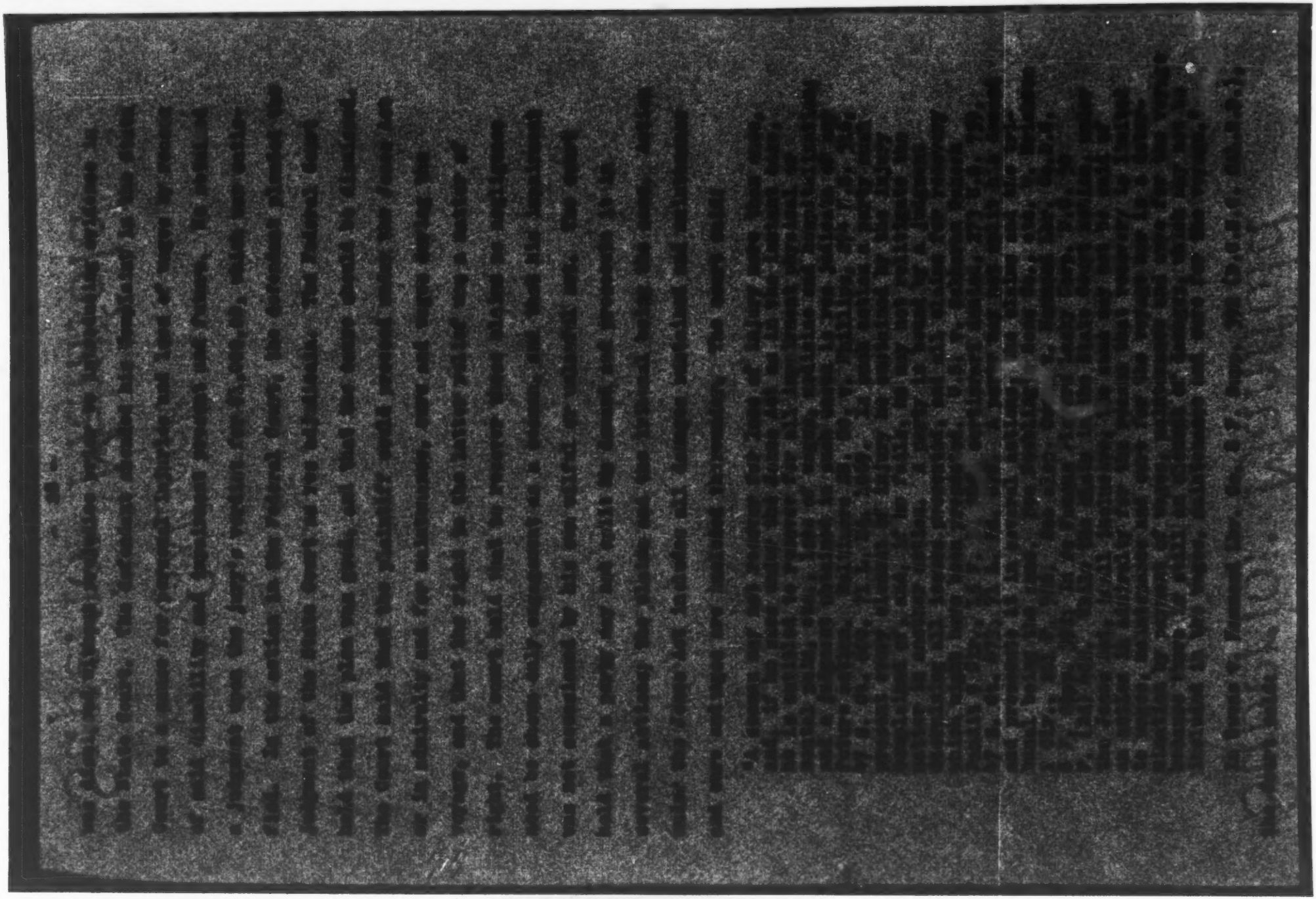

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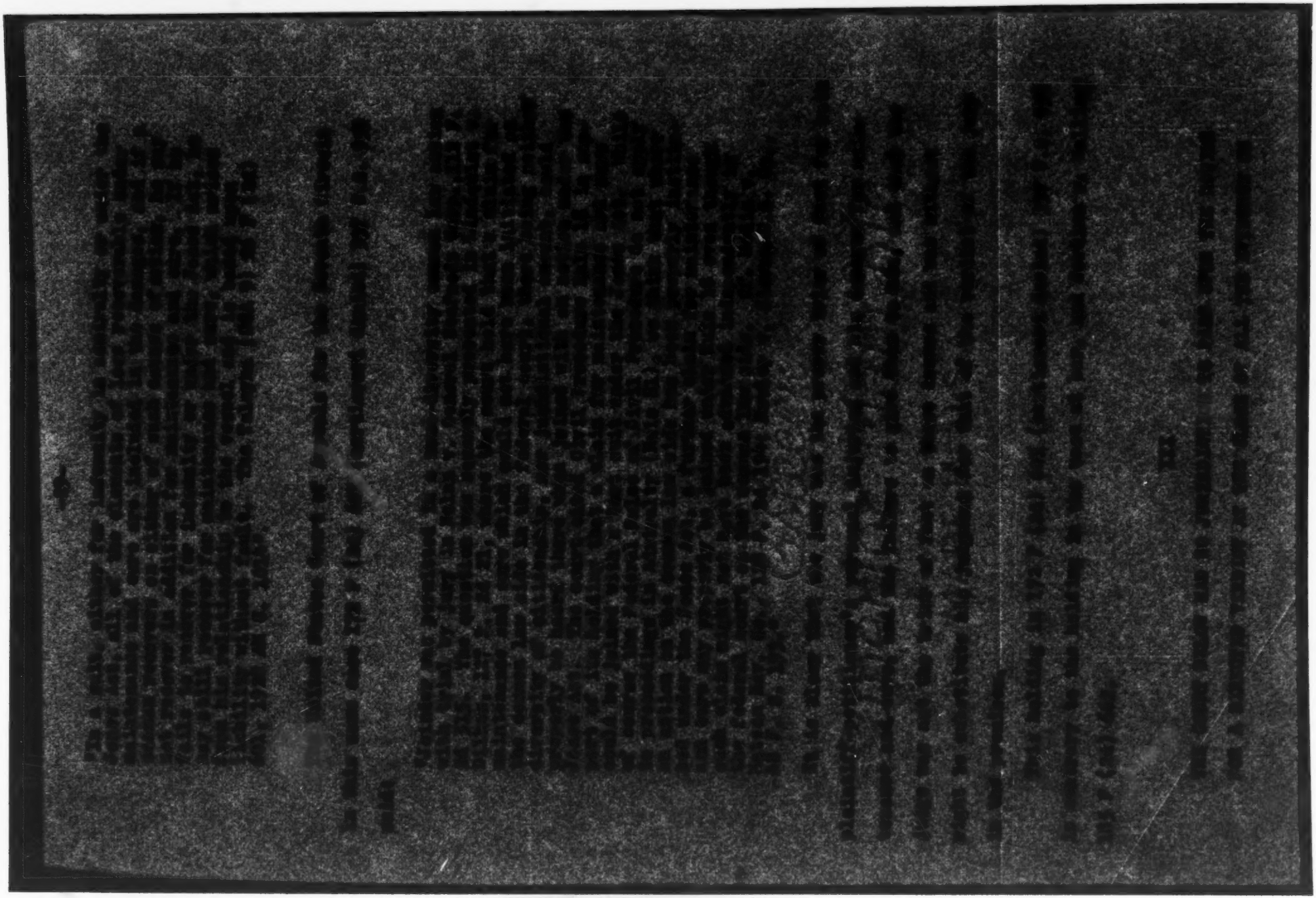

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Rule 50 of the Rules of Civil Procedure, hereinafter referred to as "R.C.P."; provides that the motion for directed verdict shall state the specific grounds therefor. When the motion is not stated in the proper form, the court is bound to have rejected the motion in the first instance on a strict interpretation of any legal technicalities raised by the motion. But to preserve his rights, the defendant-respondent must object to any error the rejection of the motion, have it entered on the judgment entered thereon and within and to have judgment entered in accordance with his motion for a directed verdict. In the case at bar, the defendant-respondent failed to file any such motion, and none was granted.

Prior to the year 1935, the Federal Court having denied a motion for a directed verdict, it could not enter judgment notwithstanding the verdict.

[redacted]

This was a five to four decision of the Supreme Court. The reason given for the decision was that the seventh amendment to the United States Constitution guarantees a right to a trial by jury. A federal court could only grant a new trial or reverse for new trial.

In 1935 in the case of Baltimore and Carolina Line v. Redman, 295 U.S. 654, where the trial court reserved a ruling on a motion for a directed verdict, the Supreme Court distinguished the case and held that where a reservation of the ruling was had by the trial court that court or the U. S. Court of Appeals could grant judgment notwithstanding the verdict, set aside the judgment and order judgment for

the other party or grant a new trial. Under Rule 50 (b), no express reservation is necessary, but a motion for judgment notwithstanding the verdict or for new trial must be made within ten days of the date of the entry of the judgment on the verdict or the reception of the verdict.

Rule 58 F.R.C.P. provides for forthwith entry of a judgment upon the verdict of the jury by the Clerk unless the Court otherwise directs.

Failure to move for judgment notwithstanding the verdict within ten days as provided for in Rule 50 (b) F.R.C.P. is jurisdictional,

Southwestern Greyhound Lines v. Hennessy
C.C.A. 6th Cir. 1948, 169 F. (2d) 1 Certio. denied,
335 U.S. 861.

Fenton v. Montgomery Ward & Co. Inc. 1950, 87 F. Supp. 8.

In the event of the failure of a defendant to move for judgment notwithstanding the verdict after the motion for a directed verdict was denied, prevented the timely entry of appeals from directing entry of judgment for the defendant-respondent in the absence of such motion provided in the Federal Rules, following this denial of the defendant-respondent's motion, pursuant to Rule 50 (b).

Dunn v. N. Y. Cent. & Hudson Riv. R., 328 U.S. 112.

Simmons v. Chesapeake & O. Ry. Co., 1951, 87 F. Supp.
213 aff'd., 188 F. (2d) 315.

The construction of the court of the ruling upon the motion for the directed verdict, and the reception of the verdict thereafter without compliance with Rule 50 (b) by the defendant-respondent robbed the court of jurisdiction to entertain such motion, and constituted a waiver by the defendant-respondent of its right to judgment notwithstanding the verdict.

The District Judge in his written memorandum says ( R. [illegible])
that the defendant-respondent failed to comply with Rule 50 (b) of the Federal Rules of Civil Procedure by failing to file a motion "within ten days after the reception of a verdict", etc. The court

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the motion. It is a condition precedent to the jurisdiction of the court to hear or entertain such motion that it be filed within ten days from reception of the verdict, notwithstanding counsel by the "additional power" to receive motions or entertain for a later considered ruling to relieve them from the position in which they are placed by their failure to comply with the provisions of the Rule. To say this favors "additional power" has been expressly repudiated by the adoption of Rule 52 (b), and that both Chevron of Defendant-Appellant's counsel attempt to escape the fact of their non-compliance with Rule 59 (b).

Defendant-Appellant seeks to escape from the failure to file a written motion for a directed verdict with reference to the 3rd Count of the Complaint, and to have review therefore under the provisions of Rule 7 (b) (1) of the Federal Rules of Civil Procedure. The Plaintiff bases it's opinion (Tr. 46) that the case of Kennedy Lumber v. Hydro-Electric Power Company, 16 Fed. Supp. 998, 99 [illegible] as authority for its view. This case is only authority to the effect that a motion to dismiss may not be made orally during the argument on another motion, but must be made in writing. Wilson on Federal Rules Service (1939) page 44. Under Rule 59 (b) the motion is to be filed within ten days of the reception of the verdict, and it must be in writing because no oral motion is to be heard or tried pending such as contemplated by Rule 7 (b) (1). The very case cited by the Plaintiff supports the position that no motion may be made for a directed verdict [illegible] and permit [illegible] oral motion for a directed verdict. Defendant-Appellant made the oral motion for a directed verdict as to Count III of the Complaint at the argument, and not at the trial. While [illegible] has been no written motion of any kind in accordance with Rule 59 (b) in relation to the 3rd Count of the Complaint, to admit that those written motions, as to Counts I and II of the Complaint, studiously and carefully prepared in advance of there having been made, were

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filed as to those issues of the Complaint, and not as to Cou
because of the unsettled judgment of defendant-respondent's counsel
that plaintiff-petitioner was entitled to recover under Count III
under any and all circumstances.

The court never had before it at the conclusion of all the evidence, nor within ten days thereafter the question of the verdict, or at any other time, any written motion for judgment notwithstanding the verdict as to Count III of the Complaint.

The Court of Appeals failed to pass upon this important point raised by the plaintiff-petitioner in his appeal.

## CONCLUSION

Petitioner respectfully submits that the decision of the Court of Appeals is a decision of important federal question in a way probably hereinafter with the published decisions of this Court, is in conflict with the decisions of the Court of Appeals for other circuits on the same matter, and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The petition for writ of certiorari should be granted.

Respectfully submitted,

Attorney for Petitioner
Chicago, Illinois